

Claimant was employed by the respondent from October 28, 1992, until he was laid off because of a work force reduction on March 26, 1999. During claimant's period of employment with respondent, he suffered injuries to both of his wrists as a result of performing his regular job duties as a toolmaker. The parties stipulated to a September 18, 1997, accident date.

The claimant appeals from the Administrative Law Judge's Award limiting claimant to a 29 percent permanent partial general disability based on permanent functional impairment. Claimant contends he has proven, as a result of his work-related injuries, he is entitled to a 78.3 percent work disability based on a 100 percent wage loss and a 56.5 percent work task loss.¹

In contrast, respondent requests the Appeals Board to affirm the Administrative Law Judge's Award. The respondent argues, after claimant received medical treatment for his work-related injuries, he was returned to his regular toolmaker job without accommodation and demonstrated his ability to perform that job at the same wage he was earning pre-injury. Accordingly, respondent argues claimant's permanent partial general disability is limited to his permanent functional impairment rating.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Appeals Board makes the following findings and conclusions:

The Appeals Board finds the Administrative Law Judge's Award entitling claimant to 29 percent permanent partial general disability should be affirmed. The Appeals Board does so based on the findings and conclusions set forth in the Award. Those findings and conclusions are adopted by the Appeals Board as if specifically set forth in this Order.

In particular, the Appeals Board agrees with the Administrative Law Judge that claimant's permanent partial general disability is limited to his permanent functional impairment rating because of the Court of Appeals holding in Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997). The claimant in Watkins, as in this case, returned to his regular job without special accommodations after treatment for his work-related injuries. The injured worker was physically able to return to his regular job and earn a wage comparable to his pre-injury wage. The injured worker then lost his job because the store where he was working was sold by the respondent. The Court of Appeals denied the injured worker a work disability holding that an injured employee who subsequently loses his or her job for economic or other reasons, not associated with his work-related injury, is not entitled to a work disability, absent a change in the employee's physical condition. 23 Kan. App. 2d at 839.

The Appeals Board disagrees with the claimant's contention that this case is not controlled by Watkins but is controlled by the Court of Appeals holding in Gadberry v. R.L. Polk & Company, 25 Kan. App. 2d 800, 975 P.2d 807 (1998). The claimant argues he is entitled to a work disability because, as in Gadberry, claimant's accident occurred after the work disability test was changed by the 1993 amendments to the Workers Compensation

¹See K.S.A. 1997 Supp. 44-510e(a).

Act. The work disability test in Watkins was a two part test that considered loss of claimant's ability to perform work in the open labor market and to earn comparable wage.² In Gadberry, the work disability test also was a two part test, but the test is a measurement of the loss of the employee's ability to perform work tasks averaged with the claimant's actual loss of wages.³

The Appeals Board agrees with the claimant's argument that Gadberry was based on a different work disability test than was Watkins. The Appeals Board concludes the Court of Appeals in Gadberry held the claimant was entitled to a work disability not because the work disability test changed but because the reason respondent gave for claimant's termination was a mere pretext. The respondent in Gadberry alleged claimant was terminated because her department had been shut down or discontinued. But the Court of Appeals noted that at least two of claimant's subordinates, who claimant had trained, were retained by respondent. Also, the work claimant previously performed was continued, in large measure, by respondent's other employees located in the Hutchinson, Kansas, facility. In holding the claimant in Gadberry was entitled to a work disability, the Court of Appeals quoted the Administrative Law Judge's finding that "While there may have been a reorganization of job titles, Claimant, a 37 year employee of respondent, appears to have been treated unfairly."

The Appeals Board concludes the Watkins case also applies to the post July 1, 1993, work disability test because the court's analysis is based on returning an injured worker to an unaccommodated job instead of an accommodated job.⁴ The Watkins' court discussed it's earlier holding in Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995), that granted a claimant, who was laid off for economic reasons, a work disability. The Lee case was distinguished from Watkins because, unlike Lee, Watkins was not working in an accommodated position. 23 Kan. App. 2d at 838. The claimant in Watkins was denied a work disability because he returned to an unaccommodated job and earned a comparable wage. Therefore, by definition, the worker did not have a work disability. If the employee loses the unaccommodated job for economic or other reasons, not related to the injury, the loss of the job cannot by itself create a work disability, absent a change in the worker's physical condition. 23 Kan App. 2d at 839.

Here, the claimant, like in Watkins, after his work-related injury, returned without restrictions to his regular job as a toolmaker earning the same wage as he earned before the injury. He was then laid off because of a reduction in the work force. There is no evidence of a change in claimant's physical condition. Accordingly, the claimant is not

²See K.S.A. 1992 Supp. 44-510e(a).

³See K.S.A. 44-510e(a).

⁴See also Niesz v. Bill's Dollar Stores, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999) (Applied the principles announced in Watkins to the post July 1993 work disability test).

entitled to a work disability award but is limited to an award based on his permanent functional impairment rating of 29 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's February 23, 2000, Award, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas M. Warner, Jr., Wichita, KS
Vincent A. Burnett, Wichita, KS
Eric K. Kuhn, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director